1999

Shawn R. McElroy v. Kerry Lee McElroy (nka Kerry L. Robertson) : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

SHAWN MCELROY Petitioner and Appellee, vs. KERRY LEE MCELROY (aka Kerry L. Robertson), Respondent and Appellant.	**Appellate Court No. 990478-CA** Priority No. 4

BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals exercises jurisdiction over this matter pursuant to section 78-2a-3(2)(h) of the Utah Code.

STATEMENT OF THE ISSUES and STANDARD OF REVIEW

Appellee Shawn McElroy (Shawn) objects to appellant Kerry McElroy's (Kerry) reliance upon a magazine article to establish the standard of review concerning her issues.

ISSUE 1: Shawn submits that Kerry's Issue 1 should be divided into two separate issues as follows: (1a) Whether the trial court abused its discretion in entering its findings of fact on the disputed issues orally rather than in writing?; and (1b) Whether the trial court abused its discretion in not accepting the recommendation of the court-appointed custody evaluator? Shawn believes these are two separate and very disparate issues and should be addressed separately.

Shawn submits that the standard of review for these two issues should be the abuse of discretion standard. Because the first issue deals with the application of a statute, the standard of review should be an abuse of discretion standard. Shawn submits that the trial court's acceptance or rejection of the evaluator's recommendation is a decision concerning modification of a divorce decree. The standard of review for such decisions is an abuse of discretion. *Hagan v. Hagan*, 810 P.2d 478, 481 (Utah App. 1991) (citing *Myers v. Myers,* 768 P.2d 979, 984 (Utah App. 1989)).

ISSUE 2: Shawn believes that Kerry intended to state her Issue 2 as "Was there sufficient evidence to support the trial court's finding of no substantial [CHANGE OF] circumstances in combination with the best interests of the child[REN]?"

Kerry's challenge to the sufficiency of the evidence concerns the trial court's findings of fact. A trial court's factual findings underlying a holding of material change of circumstances in a divorce decree may not be disturbed unless clearly erroneous. *Cummings v. Cummings,* 821 P.2d 472, 476 (Utah App. 1991). The trial court's factual determinations are clearly erroneous only if they are in conflict with the clear weight of the evidence. *State v. Bobo,* 803 P.2d 1268, 1271-72 (Utah App. 1990). URCP Rule 52(a) also sets the standard of review as clearly erroneous.

ISSUE 3: Shawn believes this issue should be stated "Whether, because Kerry was asking the court to modify a custody award that had not been previously litigated, the trial abused its discretion in requiring Kerry to establish a substantial and material change of circumstances?" Concerning the standard of review, a trial court's decision concerning modification of a divorce decree will not be disturbed absent an abuse of discretion. *Hagan v. Hagan,* 810 P.2d 478, 481 (Utah App. 1991) (citing *Myers v. Myers,* 768 P.2d 979, 984 (Utah App. 1989)).

CONSTITUTIONAL OR STATUTORY PROVISIONS

UTAH RULES OF CIVIL PROCEDURE, PART VI. TRIALS, Rule 52 (1999)

Rule 52. Findings by the court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings

are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) Waiver of findings of fact and conclusions of law. Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of

fact: (1) by default or by failing to appear at the trial; (2) by consent in writing, filed in the cause; (3) by oral consent in open court, entered in the minutes.

STATEMENT OF THE CASE

The parties to this action were divorced by a decree entered by the Third District Court on July 22, 1996, based upon Kerry's consent and default. In February 1997, Kerry petitioned the court to modify the custody award contained in the decree of divorce. In April, 1997, Dr. Davies was appointed by the court as the custody evaluator. In September, 1997 Shawn filed his first motion to proceed or dismiss because no action had been taken by Kerry to proceed with the ordered custody evaluation. (R. 354-7) In June, 1998, Shawn filed his second motion to proceed or dismiss because for several months, there had been no activity concerning the custody evaluation. (R. 408) In June, 1998, Shawn also filed a motion to appear before the judge rather that the commissioner in an attempt to bring this action to a conclusion. (R. 382)

Following a hearing in September, 1998, Commissioner Casey recommended that the children stay with Kerry until the custody evaluator met with Shawn. Following that meeting, the children were returned to Shawn.

In December, 1998, a one day trial was held before Judge David S. Young. At the conclusion of trial, Judge Young found that Kerry had failed to reach the evidentiary threshold of the "substantial change of circumstances" test and denied her petition to change custody.

In her brief on page 35, Kerry notes that Shawn's case consisted of less than 15 pages in the court record. Then on page 36 of her brief, Kerry states that Shawn presented no evidence to contradict evidence presented by Kerry. However, Kerry fails to inform this Court that as soon as Kerry rested, the trial court limited Shawn's opportunity to present additional evidence when the judge stated "Now I need to have you understand that I have 58 minutes left to try this case, including argument and ruling." (Tr. 227) Kerry's implication that Shawn had little evidence to present is patently unfair in light of the time limitations imposed upon Shawn by the trial court to present said evidence. The implication in her brief that no evidence was presented to contradict evidence presented by Kerry ignores the several instances when it was shown during her cross-examination that Kerry's presented evidence had been false.

RELEVANT FACTS

1. On February 5, 1997, Kerry petitioned the court to modify the existing custody award claiming that Shawn had attempted to sever and destroy the relationship between Kerry and her children to include restricting phone contact and unilaterally altering visitation arrangements, that Shawn had not properly supervised the children due to his work schedule, and that Shawn had refused to communicate directly with Kerry regarding visitation issues. (R. 1-4)
2. On February 21, 1997 Kerry filed a Verified Motion for Order to Show Cause wherein she claimed that Shawn had denied her visitation rights by stating under oath that "Plaintiff refused to allow defendant any visitation rights from July, 1996 to January, 1997 which included holidays such as the children's birthdays, July

4th, Labor Day, fall school break, Columbus Day, Thanksgiving and Christmas break." (R. 94 at (b))

At trial, under cross-examination, Kerry admitted that she had lied about Shawn denying her visitation during the period from July, 1996 through January, 1997, and in fact she had conducted visitation with the children during that period. (Tr. 190- 191) Also under cross-examination, Kerry admitted that she voluntarily had not visited her children during the mid-week visitation period for at least 20 consecutive weeks before the day of trial. (Tr. 183)

3. On April 2, 1997 Kerry filed a Verified Motion for Order to Show Cause wherein she accused Shawn of denigrating her by stating "Plaintiff wanted the children to go home with him after the appointment at the hospital. This was defendant's weekend to exercise visitation with the children and they wanted to be with her. Plaintiff called defendant a "stupid asshole" in front of the children because defendant would not give up her visitation with the children. Ian heard this and asked defendant why plaintiff had called her that. Zane also commented on hearing Daddy call defendant a bad word." (R. 143 at #12)

At trial it was shown that this single instance of denigration described by Kerry occurred at the hospital when she insisted on taking the burned child to her home to be tended by her roommate rather than allowing him to stay with and be comforted by Shawn. (Tr. 164) On cross-examination, Kerry admitted that on the evening that she had taken the injured child home, she then went to work leaving the child with surrogate care rather than allowing him to stay with his father. (Tr.

206) The trial court found this act by Kerry to be insensitive to the child's needs. (Tr. 245)

4. On August 17, 1998, Kerry filed the pleading which she had signed on August 7, 1998 entitled Verified Motion For Appointment of a Guardian Ad Litem and Request For Admonishment to Petitioner To Cooperate in Custody Evaluation, wherein she indicated to the court that Shawn refused to give her access to the children by asking the court to order the petitioner "to cooperate in the custody evaluation by giving respondent access to the children." (R. 417-423)

At trial, under cross-examination, Kerry admitted that she had received the children from Shawn on August 1, 1998 and that the children had been with her continuously for at least six days before she signed her motion wherein she intimated to the court that Shawn had refused to give her access to the children. (Tr. 181-183) The children had continuously been with Kerry for 17 days when she filed her motion asking the court to admonish Shawn for not allowing the children to be with her.

5. At trial, Kerry reiterated the basis of changed circumstances listed in her petition and added the claim that Shawn had not allowed Kerry to provide daycare, and claimed two instances of physical abuse by Shawn upon the children. (Tr. 8-9)

During cross examination, Kerry admitted that Shawn had brought the children to her for daycare and that she alone had not given the children daycare, but rather she at times left the children with her roommate while she went to work. (Tr. 193-194)

6. Concerning Kerry's claim of two instances of physical abuse of the children by Shawn, in her brief Kerry mentioned physical abuse no less than 19 times. (Appellant's Brief at page 9 paragraph #10, #11, #13, page 10 paragraph #14, #15, #19, page 11 paragraph #25, page 15 paragraph #e, page 18 paragraph #c, page 20 paragraph #46, page 21 paragraph #49, page 26 paragraph #L, page 27, page 34 paragraph #1, #5(1), page 35 paragraph #(3) # last line, page 37, and page 41)

However, during cross-examination, Kerry stated that she had never seen Shawn abuse the parties' children and that before the divorce, as a father, Shawn was "almost perfect." (Tr. 186)

During trial, the custody evaluator defined having the children stand with their nose to the wall as physical abuse. (Tr.30, 67) He also stated that he felt that Shawn had abused the children by hitting them with a belt based upon information related to him by the children. (Tr. 65) When asked if it were possible that the children had been unduly influenced or coached concerning incidents of physical abuse by their mother during the 26 days the kids had been with her immediately before his interview with them, Dr. Davies stated "yes." (Tr. 69)

During his testimony, Shawn stated that before the divorce and prior to receiving training from DCFS concerning corporal punishment, he had hit the kids with a belt, but that he had not hit them any time after this training. (Tr. 238) Shawn also stated that Kerry, prior to leaving the marital home, had also disciplined the children with her hand or other objects. (Tr. 237). Shawn also

stated that he had threatened to hit the children with a belt the week before trial, but that it was just a threat. When asked why he had made such threats, his response was "Because my oldest boy would just stand in front of me and say ' If you touch me, I'll tell mom, mom will tell the judge, and you'll go to jail.'" (Tr. 238)

7. Having heard the testimony of the custody evaluator and the two parents, the trial court found that (1) there was no substantiation of abuse on two occasions after the divorce decree; (2) the family had jointly engaged in corporal discipline; (3) that standing a child in the corner with his nose to the wall, one minute for each year of his age, was not abuse. (Tr. 243-244)

8. At the conclusion of the trial, the judge admonished both parents concerning disciplining the children by physical means. (Tr. 243-244)

9. The trial judge did find evidence of rigidity in Shawn, but did not find that he had become more rigid after the divorce. Therefore, the court did not find a material change based upon Shawn's rigidity. (Tr. 246)

10. Concerning Kerry's claim that Shawn had interfered with her relationship with her children, her brief mentions this problem no less than 12 times. (Appellant's Brief at page 10 paragraph #16, #18, page 11 paragraph #24, page 12 paragraph #26, page 15 paragraph #38, page 16 paragraph #b, #c, #d, page 17 paragraph #l, page 22 paragraph #51, page 39, and page 42)

However, having heard the testimony of the custody evaluator and the two parents, the trial court found that both parents had acted very immaturely during the pendency of this action, but that there was not sufficient evidence to find a

substantial change of circumstance based upon the parents attempting to cut the children out of the other parent's life.

11. Dr. Davies testified that prior to trial, he had not completed his custody evaluation in that he had not done interviews with Shawn's new wife or any of Shawn's collateral witnesses. (Tr. 118, 17) Dr. Davies also testified that, although visitation and support were two important factors to consider in making a recommendation, he did not know how much visitation Kerry had had with the children (Tr. 122-123) nor did he know how much child support Kerry had paid during the 2 ½ years since the divorce. (Tr. 96)
12. There was no written report submitted to the court by the custody evaluator.
13. At trial, Shawn objected to receiving testimony from the custody evaluator as Kerry's first witness on the basis that no substantial change of circumstance had been demonstrated. (Tr. 9) Shawn renewed this objection following Dr. Davies testimony. (Tr. 138)

SUMMARY OF ARGUMENT AND OBJECTION TO ORAL ARGUMENT

Kerry's first issue, that the trial court failed to make its findings in writing is defeated by statutory and case law which both indicate oral findings are adequate and written findings are not required.

Kerry's second issue, that the trial court rejected the custody evaluator's recommendation is defeated by extensive case law that requires trial courts to establish a substantial change of circumstance before proceeding to the determination of the best interests of the children, which would include the custody evaluator's

recommendations. The trial court found there was no substantial change of circumstance. Therefore, the custody evaluator's recommendation concerning the best interest of the children was not relevant and the trial court did what it was required to due under Utah law.

Kerry's third issue, insufficiency of the evidence to support the trial court's findings is defeated by her failure to marshal the evidence and her failure to demonstrate, despite such evidence, that the trial court's findings are clearly erroneous.

Kerry's final issue, that the court abused its discretion by applying the substantial change of circumstance test to a custody award that was not previously litigated is defeated by Utah case law which requires the substantial change of circumstance test be met regardless of prior litigation concerning custody.

Concerning Kerry's request for oral argument, she provides no reason to this Court to support her request. As Kerry makes no argument to expand current law, nor makes any constitutional argument, there appears to be no valid basis to commit this Court's resources to an exercise that would be little more than yet another rehash of the trial testimony. Therefore, Shawn urges this Court to deny Kerry's request for oral argument.

ARGUMENT

FIRST ISSUE - Oral findings are allowable.

Concerning the first part of Kerry's first issue, the trial court did not error in issuing its findings orally. Section (a) of the URCP Rule 52 states in pertinent part

that "It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court."

In addition to statutory authority for the court to make its findings orally rather than in writing, Utah case law, to include *Hansen v. Hansen* 736 P.2d 1055 (Utah 1987), establishes that oral findings made by the trial judge at the close of evidence are sufficient to support a custody award.

On page 36 of her brief, Kerry misstates the current law by citing to Section (c) of URCP Rule 52 rather than Section (a) and by citing a 1983 case that pre-dated the change in Rule 52(a) that now allows findings to be made orally. Therefore, this issue should be dismissed as baseless.

SECOND ISSUE - Custody evaluator's recommendation.

The second part of Kerry's first issue, whether the trial court abused its discretion by rejecting the custody evaluator's recommendation is closely aligned to her final issue, whether the trial court abused its discretion by applying the substantial change of circumstance test to a custody award that was not previously litigated. Therefore Shawn's argument will address both of these issues together below.

THIRD ISSUE - Sufficiency of the evidence to support the trial court's findings.

APPELLANT HAS FAILED TO MARSHAL RELEVANT FACTS ON APPEAL

Section (a) of the URCP Rule 52 states in pertinent part that "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly

erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

The party seeking to overturn the trial court's findings has the burden of marshaling the evidence in support of the findings and then demonstrating that, despite such evidence, the findings are so lacking in support as to be against the clear weight of the evidence and therefore, clearly erroneous. *Hagan v. Hagan,* 810 P.2d 478 at 481 (citations omitted).

Kerry has neither marshaled the evidence in support of the trial court's findings nor demonstrated that such findings are clearly erroneous, citing instead only the carefully selected evidence that supports the outcome she desires. Further, in her brief, Kerry has slanted her presentation of the evidence heard by the trial court and in some cases she has attempted to mislead this Court by actually misstating the testimony given at trial.

In her brief at page 17, paragraph (n) Kerry has represented to this court that she testified at trial (citing Tr. 164-165) that "after entry of the decree, Zane received second and third degree burns while in the care, custody, and control of his father." A review of the referenced trial testimony (Tr. 164-165) shows Kerry went on under oath to say ". . . when Shawn brought Zane, there was no salve, no medication, nothing. Me, myself, I called the Burn Unit. I had to find out what to put on and we went and bought the stuff because Shawn never brought it. That is how concerned he was about treating Zane."

In her brief, Kerry made no mention that upon cross examination Kerry admitted that it was she and not Shawn who had taken the burned child home from the hospital. (Tr. 206) Kerry also does not mention that the trial court made a finding that it was insensitive to the child's needs that Kerry had removed the injured child from his father and then went to work leaving the child with surrogate care. Nor does Kerry mention in her brief that the trail judge found no creditability in her testimony that the lack of medical supplies was Shawn's fault, but that the judge found instead the incident was Kerry's fault. (Tr. 245) By selectively reporting only a portion of the testimony concerning the burned child, Kerry deliberately slanted her presentation to this Court in order to support the outcome she desires. She clearly did not demonstrate that the trial court's finding was clearly erroneous.

An example of Kerry's misstating the testimony of trial witnesses can be found in her brief at page 17, paragraph 39(a) wherein Kerry states "The child care provider testified that she observed marked behavioral changes in the children in September, 1998, a short time after Dr. Davies reported the children had been whipped with a belt by their father. (Tr. 231 & 235-236)" The babysitter never testified that she had observed behavioral changes in the children a short time after Dr. Davies reported the children had been whipped with a belt, but instead she testified that her knowledge of Dr. Davies was limited to Shawn having told her that he had "left my name and phone number with the doctor for any further questions." (Tr. 236)

Again on pages 35, 36, and 37 of her brief Kerry mentions the babysitter testifying that the children's relationship with their father had changed following the

time when Dr. Davies reported physical abuse. Never, during any of her 5 mentions of the babysitter, does Kerry point this Court to the fact that the babysitter had testified that from March, 1998 until August, 1998 she observed the boys on a daily basis express love for their father by lots of kisses and asking Shawn for a hug. She testified that prior to August 1998, she had never detected any fear of Shawn in the boys (Tr. 228-230). The sitter did testify that immediately after August, the boys did "a hundred percent turnaround." She stated that the boys had changed from happy go lucky active boys to "Back-off, I don't want any hugs and kisses." (Tr. 231) The sitter reported that never before, but only after August, did the boys state their father didn't love them, he was just a babysitter, he was not their father. (Tr. 232)

Kerry's repeated references to the change in the boys at the time Dr. Davies decided there had been some physical abuse is clearly meant to lead this Court to conclude that Shawn had abused the boys in August and that is why they were claiming he was no longer their father and that they didn't love him. This is a blatant attempt by Kerry to mislead this Court for the simple fact that Shawn had no contact with the boys during the month of August, 1998. Kerry took custody of the children on August 1, 1998 (Tr. 182) and had them with her, without interruption, the entire month. (Tr. 235)

The Babysitter's testimony was in fact, that in her experience the children consistently loved and cherished their father from the time she first knew them until they were removed from him and left solely with Kerry for one month. Immediately upon their return from Kerry, the boys demonstrated a complete reversal and wished little contact with their father. The point of the babysitter's testimony was that

something happened to alienate the boys from Shawn during the month they were with Kerry for her uninterrupted visitation immediately prior to Kerry and the children meeting with the custody evaluator. By misstating the babysitter's testimony and intimating that Shawn had been beating the children, Kerry's brief leads this Court in the exact opposite direction of what the trial court actually heard from the babysitter during trial.

Then, in the first paragraph on page 37 of her brief, Kerry uses her misstated testimony of the babysitter to declare the trial court was conclusory in its findings because it made no comment on why the court rejected the consistency in the observations and opinions of Dr. Davies, the mother and the babysitter. This is an example of Kerry's manipulating the evidence rather than marshaling it.

On the subject of consistency of observations and opinions between Dr. Davies and the mother, Kerry again repeatedly fails to marshal the evidence but instead presents only selected evidence that tends to support her position. For example, on the subject of why Kerry had relinquished the custody of the boys to Shawn when she left the marital home, on direct examination Dr. Davies testified that "one of the sticking points in this evaluation was why Ms. Robertson (Kerry) opted to join the military, that confounded me and I never really resolved that issue to be honest with you." (Tr. 49) On cross examination he stated that one of the major factors he considered in his evaluation was why Kerry had relinquished the boys' custody and that he had understood that she was going to join the reserves to improve herself and provide more for the children in the future. (Tr. 83-84)

When asked, if he were to be told that Kerry had enlisted for six years in the active Army rather than in the reserves, would that change his reflection on the reason for Kerry relinquishing her custody, Dr. Davies stated "it would." When asked if such knowledge would change his recommendation he stated "it could." (Tr. 84-85)

On direct examination concerning the confusion about her joining the reserves or the active Army, Kerry testified that she was in the reserves and that she would be out of Utah for only four weeks and then she would return and stay in Utah. (Tr. 154) Upon cross examination, when asked if she had joined the active Army, Kerry stated that she had joined the reserves. (Tr. 179 line #7) When confronted with a copy of her active duty Army enlistment contract and asked specifically to deny that on November 25, 1996, she had enlisted for six years in the active Army, Kerry admitted that she had indeed enlisted in the active Army for six years. (Tr. 179 line #18) This complete reversal of Kerry's testimony concerning what the custody evaluator had considered to be a "major consideration" in establishing his recommendation never appeared in Kerry's brief.

What did appear on page 26 (k) of Kerry's brief, while describing Dr. Davies' testimony concerning the evaluation factors under rule 4-903, was the statement "Neither parent appeared to have previously abandoned or relinquished custody in the past. (Tr.55) The evaluator considered mother's election to leave the children with their father at the time of entry of the divorce decree. (Tr. 83-84). He understood that she was going into the reserves and not on a six year tour or the army, as the father's

attorney claimed in his cross-examination. (Tr. 84-85). That fact, if true, "could" change his opinion. (Tr. 85). Mother testified that she was in the reserves. (Tr.154-155)"

In this paragraph of Kerry's brief, it is stated that Kerry testified that she was in the reserves, and it is stated that Shawn's attorney claimed this was false. However, nowhere does Kerry's brief mention that under cross-examination, Kerry finally did admit that she had in fact enlisted in the active Army for six years rather than in the reserves as she had testified on direct and as Dr. Davies had understood when he "considered mother's election to leave the children with their father . . ." This failure to mention that Shawn proved at trial that Kerry's direct testimony was false and the evaluator had been misled while making his recommendation is just one more example of Kerry's brief hiding from this Court a portion of the significant facts heard by the trial court before it made its findings.

Unlike the claim made in Kerry's brief, Shawn believes the trial court did consider the creditability of the witnesses in formulating its finding of no substantial change in circumstance and found Kerry's conflicted testimony to be lacking in creditability or merit.

As demonstrated above, Kerry has failed to establish that the findings of trial court were clearly erroneous. In the first sentence of her argument Kerry states that the appellant must reference all of the evidence supporting the finding that is challenged. She has intentionally failed to so marshal the evidence and this Court should therefore accept the trial court's findings without further question.

FINAL ISSUE – Proper test for custody award not previously litigated.

Kerry's second issue questions the trial court's rejection of the custody evaluator's recommendation. This issue is directly tied to Kerry's final issue concerning the trial court's application of the substantial change of circumstance test to a custody award that had not previously been litigated. In effect, Kerry claims the trail court abused its discretion by bifurcating the trial into a substantial change of circumstance test and then, having found no change of circumstance, rejecting the custody evaluator's recommendation.

In the case of *Walton v. Walton*, 814 P.2d 619; (Utah App. 1991) this Court was faced with facts very similar to this case in that the Waltons, like the McElroys had completed an uncontested divorce, the children had been awarded to one parent and then the other parent filed a petition to modify the divorce decree, seeking custody of the children on the basis of a substantial change in circumstances. In *Walton* and in this case, following a trial, the court held in pertinent part, that the petitioning parent had not presented sufficient evidence to show a substantial change in circumstances with regard to the custody question, and therefore denied the petition to modify custody.

In both cases, the parent who was denied a change in custody claimed, on the basis that the original custody award had not been litigated, that the trial court had abused its discretion in basing its refusal to modify the custody arrangement on the lack of a substantial change in circumstances. The *Walton* court stated it is the burden of the party seeking modification of a divorce decree to demonstrate that there has

been a substantial change in circumstances that justifies modification. Id. at 621. Both Mr. Walton and Kerry argue that in previously unlitigated cases, the trial court must base its ruling on the best interests of the children rather than first finding a substantial change in circumstance and then considering the bests interests of the children.

The *Walton* court disagreed with Mr. Walton (Id. at 621) and this Court should disagree with Kerry. In developing the *Walton* ruling, this Court summarized the state of this legal question in Utah as is condensed following:

> In *Hogge v. Hogge, 649 P.2d 51, 53 (Utah 1982),* the Utah Supreme Court developed a two-part procedure for obtaining a change of custody. The party seeking modification must first establish that there has been a substantial change in circumstances occurring subsequent to the divorce, and then show that the change of custody is in the best interests of the child. This rule was later qualified in Elmer which held that "in change of custody cases involving a nonlitigated custody decree, a trial court, in applying the changed circumstances test, should receive evidence on changed circumstances and that evidence may include evidence which pertains to the best interests of the child." *Elmer, 776 P.2d at 605.* The reasoning behind tempering the Hogge-Becker rule in nonlitigated custody decrees is plain: "'Too rigid an application of the rule . . . would lock a child into the custody of one parent or the other where there has been no determination on the merits of parenting ability of either parent and custody has been

awarded only because of the default of one parent in failing to oppose the complaint of the other.'" *Elmer, 776 P.2d at 603* (quoting *Kramer v. Kramer, 57 Utah Adv. Rep. 14, 738 P.2d 624, 629 (Utah 1987).*

In Elmer, the Utah Supreme Court did not replace the Hogge-Becker test with a new test requiring the trial court to look solely at the best interests of the child. Rather, Elmer merely incorporated evidence concerning the best interests of the child into the changed circumstances test in nonlitigated custody cases. Such evidence was received by the trial court in the case at bar. At the hearing on Mr. Walton's petition to modify, Mr. Walton called Linda Hunt, L.S.W., to the stand, in order to elicit testimony concerning her report and her opinion as to what would be in the best interests of the children. Counsel for Mrs. Walton objected, arguing that a substantial change in circumstances had not been established. The trial court ruled: Well, there's been some evidence, and I will permit the testimony. I realize that the foundational issue, the change of circumstances, we can't even get her change of custody to show that. Even though, there may be evidence of the best interest and welfare of the children. As long as we understand what the conditions and requirements are for change of custody, I suppose we can go ahead.

Additionally, the trial court received into evidence Linda Hunt's custody evaluation report. In permitting Hunt's testimony and admitting

her report, the trial court incorporated evidence concerning the best interests of the children into its determination that there had been no substantial change in circumstances. Elmer merely permitted the taking of evidence concerning the best interests of the child in determining whether there has been a substantial change in circumstances. "In change of custody cases involving a nonlitigated custody decree, a trial court, in applying the changed circumstances test, should receive evidence on changed circumstances and that evidence may include evidence which pertains to the best interests of the child." *Elmer, 776 P.2d at 605.* Elmer did not compel the taking of such evidence, nor do we. The modification of the Hogge-Becker two-tier approach in Elmer was meant to serve as a shield with which to protect the best interests of the child, not as a sword with which to wage on-going custody battles. Lastly, we reiterate that the high threshold established in Hogge was set forth "to 'protect the child from "ping-pong" custody awards' and the accompanying instability so damaging to a child's proper development." *Maughan, 770 P.2d at 160* (quoting *Kramer, 738 P.2d at 626).* Id. at 621-622.

The same year that this Court ruled in *Walton,* it ruled on three more cases that raised issues similar to *Walton* and to this case. In *Crouse v. Crouse*, 817 P.2d 836, (Utah App. 1991), this Court stated

As we explained in *Walton*, Elmer merely permitted incorporating evidence concerning the best interests of the child into the changed circumstances test in nonlitigated custody cases; it did not compel the trial court to take such evidence in every case. *Walton,* 164 Utah Adv. Rep. at 58. Accordingly, it was not an abuse of discretion for the trial court to base its refusal to change custody on the lack of a substantial change in circumstances without reaching the issue of the best interests of the children." Id. at 839.

In *Cummings v. Cummings* 821 P.2d 472; (Utah App. 1991) this Court stated

It certainly is eminently practical to allow non-bifurcation where the same evidence will be relevant to both issues. Our preference in cases where custody was previously nonlitigated is to leave to the trial court's discretion the decision of whether or not to bifurcate the proceedings. That position appears to be consistent with Elmer, Maughan, and *Hardy v. Hardy, 776 P.2d 917 (Utah App. 1989).* We therefore find no error in the court's failure to bifurcate in this case. We note, however, that where the trial court does not bifurcate, it still must conduct a separate analysis and make separate findings as to substantial change in circumstances. Only if a substantial change of circumstances is found should the trial court consider whether a change of custody is appropriate given the child's best interests." Id at 475-476.

In *Thorpe, v. Jensen,* 817 P.2d 387; (Utah App. 1991) this Court stated

> The rest of plaintiff's allegations do not come to bear because she failed to reach the evidentiary threshold of the "change of circumstances" test under Hogge since plaintiff focused on her own change of circumstances. Applying the first prong of Hogge, the trial court found that plaintiff did not show a substantial or material change in circumstances that would justify reopening the custody question. The trial court was, therefore, not obligated, as urged by plaintiff, to address the second prong of the test, "the best interests of the children." Id. at 392.

These four cases serve to establish the rule that trial courts dealing with a petition to modify a previously unlitigated custody award may, at their discretion chose not to bifurcate the proceedings, but if the court does not bifurcate, it still must conduct a separate analysis as to substantial change in circumstances and only if a substantial change of circumstances is found should the trial court consider whether a change of custody is appropriate given the child's best interests.

These bifurcation rules were reaffirmed by this Court in the 1995 case of *Sigg v. Sigg*, 905 P.2d 908; (Utah App. 1995) wherein this Court stated

> In Utah, requests for changes in custody arrangements are considered through a bifurcated procedure. The Utah Supreme Court requires that the trial court first "receive evidence only as to the nature and materiality of any change in those circumstances upon which the earlier award of custody was based." *Hogge v. Hogge, 649 P.2d 51, 54*

(Utah 1982). During this step, the party seeking modification must show: (1) a change of circumstances upon which the earlier custody arrangement was based and (2) that the changes are sufficiently substantial and material to justify reopening the custody question. Id at 912.

Again in 1997, the final issue raised by Kerry in her brief was addressed by this Court in the case of *Wright v.Wright*, 941 P.2d 646; (Utah App. 1997). In this case the children had been removed from the custodial parent following a default judgment. In its ruling in the *Wright* case this Court once again stated that

> Utah case law also requires trial courts to make the following two findings of fact before modifying a child custody order: "[1] there has been a material change in the circumstances upon which the earlier order was based, and [2] a change in custody is in the best interests of the child." *Soltanieh v. King, 826 P.2d 1076, 1079 (Utah Ct. App. 1992);* see also *Hogge v. Hogge, 649 P.2d 51, 54 (Utah 1982).* Even when the original custody determination did not involve a thorough examination into the child's best interests, as in this case, Utah law requires that when ruling on a petition requesting a change in a child's custody, the trial court "still must conduct a separate analysis and make separate findings as to [a] substantial change in circumstances." *Cummings v. Cummings, 821 P.2d 472, 475 (Utah Ct. App. 1991).* Then, "only if a substantial change of circumstances is found should the trial court consider whether a change of custody is appropriate

given the child's best interests." *821 P.2d at 475-76.* For several years, Utah courts have required trial courts to follow this two-step procedure before modifying a child custody order. See, e.g., *Kramer v. Kramer, 738 P.2d 624, 625-26 (Utah 1987); Hogge, 649 P.2d at 54; Sigg v. Sigg, 905 P.2d 908, 912, 915 (Utah Ct. App. 1995); Soltanieh, 826 P.2d at 1079; Cummings, 821 P.2d at 475; Crouse v. Crouse, 817 P.2d 836, 838 (Utah Ct. App. 1991); Thorpe v. Jensen, 817 P.2d 387, 391 (Utah Ct. App. 1991); Walton v. Walton, 814 P.2d 619, 621-22 (Utah Ct. App. 1991); Smith v. Smith, 793 P.2d 407, 410 (Utah Ct. App. 1990); Hardy v. Hardy, 776 P.2d 917, 922-23 (Utah Ct. App. 1989).* However, because all these cases were contested and decided upon the merits, none of them addressed whether a trial court must follow this same two-step procedure to modify a child custody order when the modification is part of a judgment by default.

The important public policy is to have courts ensure that a child's best interests will be met before transferring custody of the child applies in all cases involving the change in a child's custody, not just in cases involving disputes between divorced parents that are decided upon the merits. See, e.g., *State ex rel. H.R.V., 906 P.2d 913, 915-16 (Utah Ct. App. 1995)* (stating once parent has been deprived of child's custody because of neglect, Utah Code requires that in order for child's custody to be restored to parent, parent must petition court on ground

that change of circumstances has occurred and that restoration of custody is in best interests of child or public). Thus, these policy reasons apply just as much to cases involving judgments by default as to cases involving a litigated dispute decided upon the merits.

As such, in consideration of the strong public policy to safeguard the interests of children, we hold that before a trial court may enter a judgment by default that transfers custody of a child, the trial court must take evidence and then make findings that a substantial change of circumstances has occurred and that transferring custody of the child is in the child's best interests. Id. at 651-652

The argument presented in Kerry's brief supporting her position that the trial court abused it discretion in bifurcating the issues of change in circumstance and best interests acknowledges that the trial court may (but is not required to) include considerations of the best interests of the child and that the court is permitted to inquire into how the children are adapting.

On the subject of "best interests" evidence, the *Walton* trial court, over the objection of the custodial parent, received into evidence Linda Hunt's custody evaluation report. In permitting Hunt's testimony and admitting her report, the trial court incorporated evidence concerning the best interests of the children into its determination that there had been no substantial change in circumstances. In this case too, the trial court, over Shawn's objection, heard evidence concerning the best interests of the children from Dr. Davies. However, unlike the *Walton* evaluator, Dr.

Davies had not completed his evaluation nor had he produced a written report prior to trial.

In both cases the trial court, as trier of fact, was entitled to weigh the evidence and reject all or part of any witness's testimony, even that of an expert. *Chandler v. Mathews, 734 P.2d 907, 909 (Utah 1987).* In both cases the trial court, as trier of fact, found there was no substantial change in circumstance and then denied the petition to modify. In both cases, the trial court did what it was obligated to due under Utah law.

CONCLUSION

Kerry's request that this Court reverse the denial of her petition to modify custody is simply not supported by her brief and therefore, must be denied. As demonstrated above, Kerry has failed in her obligation to establish that the trial court abused its discretion by applying the "substantial change of circumstance" test in determining if a change of custody was appropriate. Kerry has failed to marshal the evidence in challenging the sufficiency of the evidence supporting the trial court's findings of fact, but rather only presented the evidence that might support the outcome she desires. Kerry has also failed to demonstrate that in light of the evidence presented at trial, the trial court's findings of fact were clearly erroneous.

Kerry's request that the case be remanded for a new trial is also not supported by her brief for the reasons just mentioned, therefore, this request must by denied.

By use of various stalling tactics, Kerry delayed the trial of this matter and thereby caused her children to suffer serious emotional turmoil for more than 22 months. Finally, the trial was held and again by using various stalling tactics

concerning her brief to this Court, Kerry has exposed her children to an additional 13 months of emotional turmoil concerning the instability of their home life. Throughout this three year dispute, both parents have incurred onerous legal fees that could and should have been spent on the children rather than lawyers. Kerry's request for a remand for written findings of fact and conclusions of law would not change the custodial situation nor provide any substantial benefit to the parties. What such an order would do, if granted, would be to needlessly increase the parties' legal fees and worst of all, unjustly continue the emotional trauma and family instability of three innocent boys. Therefore, this request should also be denied.

REQUEST FOR COSTS

Shawn has been subject to the personal financial and emotional costs of this action for more than three years. Shawn has been required to expend substantial funds to acquire the transcript of the trial in this matter in order to respond to this groundless appeal. Therefore, he asks this court to award him from the appellant's cost bond the $193.00 he paid for the transcript. Further, Shawn requests this Court to consider the bad faith exhibited in the preparation of Kerry's brief and award him any other costs and/or the legal fees the Court deems fair.

RESPECTFULLY SUBMITTED ON THIS 19th Day January 2000.

Gary Buhler
Attorney for Shawn McElroy, Appellee

CERTIFICATE OF DELIVERY

I hereby certify that on this 19 day of January, 2000, I served a copy of the forgoing document, by depositing a true and correct copy thereof in the United States Mails, addressed to:

M. Joy Jelte, M. Joy Jelte , P.C.
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Sandy, UT 84070-2033

Gary Buhler